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USA Capital First Trust Deed Fund, LLC*

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:)	BK-S-06-10725-LBR
USA COMMERCIAL MORTGAGE COMPANY)	Chapter 11
Debtor)	
<hr/>		
In re:)	BK-S-06-10726-LBR
USA CAPITAL REALTY ADVISORS, LLC,)	Chapter 11
Debtor)	
<hr/>		
In re:)	BK-S-06-10727-LBR
USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,)	Chapter 11
Debtor)	
<hr/>		
In re:)	BK-S-06-10728-LBR
USA CAPITAL FIRST TRUST DEED FUND, LLC,)	Chapter 11
Debtor.)	
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In re:)	BK-S-06-10729-LBR
USA SECURITIES, LLC,)	Chapter 11
Debtor.)	
<hr/>		
Affects)	Date: September 28, 2006
<input type="checkbox"/> All Debtors)	Time: 9:30 a.m.
<input type="checkbox"/> USA Commercial Mortgage Co.)	
<input type="checkbox"/> USA Securities, LLC)	
<input type="checkbox"/> USA Capital Realty Advisors, LLC)	
<input type="checkbox"/> USA Capital Diversified Trust Deed)	
<input checked="" type="checkbox"/> USA First Trust Deed Fund, LLC)	

**MOTION BY THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA
CAPITAL FIRST TRUST DEED FUND LLC TO COMPEL THE CONFIDENTIAL
DISCLOSURE OF USA CAPITAL FIRST TRUST DEED FUND LLC'S MEMBER LIST**

1 The Official Committee of Equity Security Holders of USA Capital First Trust Deed
 2 Fund, LLC (the "FTDF Committee") appointed in the above-captioned bankruptcy cases (the
 3 "Chapter 11 Cases") hereby files its Motion to Compel the Confidential Disclosure of USA
 4 Capital First Trust Deed Fund LLC's Member List (the "Motion").

5
 6 This Motion is made and based on the pleadings, papers and records on file in the
 7 Chapter 11 Cases, the exhibits and points and authorities attached hereto, and any evidence
 8 and oral argument to be presented at the time of the hearing of Motion.

9 DATED this 14th day of September, 2006.

10 SHEA & CARLYON, LTD.

11 
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21
 22 **POINTS AND AUTHORITIES**

23
 24 I.

25 **BACKGROUND**

26 On April 13, 2006, petitions for relief under Chapter 11 of the Bankruptcy Code were

1 filed by the following entities (collectively, the "Debtors"):

2 USA Commercial Mortgage Company ("USACMC")

3 USA Capital Realty Advisors, LLC ("USA Realty")

4 USA Capital Diversified Trust Deed Fund ("Diversified")

5 USA Capital First Trust Deed Fund, LLC ("FTDF")

6 USA Securities, LLC ("USA Securities")

7
8 On May 10, 2006, the office of the United States Trustee appointed the following
9 official committees in the USA Cases:

- 10 1. In USACMC, an Official Unsecured Creditors' Committee (the "UCC");
- 11 2. Also in USACMC, an Official Committee of Holders of Executory Contract
- 12 Rights (the "Direct Lenders' Committee");
- 13 3. In Diversified, an Official Committee of Equity Security Holders (the "Diversified
- 14 Committee"); and
- 15 4. In FTDF, an Official Committee of Equity Security Holders (the "FTDF
- 16 Committee").
- 17
- 18

19 USACMC, playing a pivotal role in the USA bankruptcies, is in the business of

20 brokering and servicing loans on behalf of certain lenders (the "Lenders"). The Lenders who

21 have acquired interests in loans brokered and serviced by USACMC include both individual

22 Lenders ("Direct Lenders"), and the two funds, FTDF and Diversified (collectively, the

23 "Funds"). The Funds, in turn, are owned by a group of individual members (the "Members,"

24 and each, a "Member") who have acquired interests in the Funds in the form of units

25 ("Interests"). These Members represent the respective constituencies of the two Fund

26

27

1 Committees.

2 On August 31, 2006, the Court set November 13, 2006, as the bar date for Lenders and
3 other creditors to file timely proofs of claim, and for Members of the Funds to file timely
4 proofs of interest.

5
6 The FTDF Committee worked closely with the Debtors' in formulating procedures and
7 preparing instructions for the timely filing of proofs of claim or interest. However, an issue
8 arose in the context of implementing procedures for Members to file timely and accurate
9 proofs of interest. The Debtors took the position that the identity of the Members, as well as
10 the amount of their interest in the Funds, was confidential, and could not be disclosed in the
11 context of publicly filed proofs of interest. To address this concern, the FTDF Committee and
12 the Debtors ultimately executed a Stipulated Order, lodged on September 12, 2006, that would
13 deem scheduled all of the Member Interests reflected in the Debtors' books and records. In
14 this way, the Debtors and the FTDF Committee were able to avoid unnecessarily disclosing
15 the identity of the Members and their respective Interests on the public record.

16
17 However, notwithstanding this arrangement with respect to the public record, the
18 FTDF Committee itself requires access to the list of Members of the FTDF, its constituents, as
19 well as a schedule of their respective Interests (the "Member List"), in order to provide
20 meaningful oversight to the Debtors' treatment and scheduling of these Interests.
21 Nonetheless, the Debtors' insist that such information is confidential even as to the FTDF
22 Committee, and have declined to provide the FTDF Committee with this information.¹

23
24
25
26 ¹ At the hearing on September 13, 2006, Debtors' counsel, Lenard Schwartzner, indicated to the Court that the
27 Debtor would work out the issue of the Member List with the FTDF Committee. Subsequently, however, he
28 suggested that the FTDF Committee file the instant motion.

1 Accordingly, and pursuant to the legal authority set forth below, the FTDF Committee now
 2 moves this Court for an order that would compel the Debtors' to provide the FTDF
 3 Committee with access to the Member List.

4 II.

5 LEGAL ARGUMENT

6 A. The Information Requested is Not Confidential as to the FTDF Committee.

7 The Second Amended and Restated Operating Agreement of the FTDF (the "FTDF
 8 Operating Agreement"), effective June 1, 2003, provides as follows:
 9

10 During the Company's normal business hours and with prior
 11 notice of at least five (5) business days, *Members and their*
 12 *designated representatives shall have access to all books and*
 13 *records of the Company. An alphabetical list of the names and*
 14 *addresses of all Members, together with the number of Units*
 15 *held by each Member, shall be...[made] available upon the*
 16 *written request of any Member or such Member's representative*
 17 *for such stated purpose...*

18 If the Manager neglects or refuses to exhibit, produce, or mail a
 19 copy of the Member list as requested, the Manager shall be
 20 liable to the requesting Member for the costs, including
 21 attorney's fees, incurred by that Member for compelling the
 22 production of the list and for the actual damages, if any,
 23 suffered by that Member due to such refusal or neglect.

24 FTDF Operating Agreement, ¶ 5.9 (Emphasis added).

25 At least one court has had the opportunity to address the confidentiality ascribed to a
 26 limited liability company's member list. In Arbor Place, L.P. v. Encore Opportunity Fund,
 27 L.L.C., 2002 WL 205681 (Del. Ch. 2002), the member of a limited liability company brought
 28 suit against the LLC to compel the LLC to provide it with access to the member list. In that
 case, the LLC's operating agreement provided merely that the members had a right to inspect

1 the LLC's "books and records." The defendant LLC argued that "books and records" did not
2 include the member list, that "the circumstances of the investment support a presumption of
3 confidentiality," and that providing access to the member list "may be in violation of the
4 federal securities laws." Id. at *3.

5
6 The court held that (1) member lists are clearly "books and records" of the LLC to
7 which a member should be entitled to access; (2) the reference to confidentiality in the
8 operating agreement clearly could not extend to a member's right to inspect the member list,
9 as such an interpretation would vitiate the provision guaranteeing a member's access to the
10 LLC's books and records; and (3) the Gramm-Leach Bliley Act did not prohibit the disclosure
11 of the member lists pursuant to an exception where disclosure is required under state law and
12 other applicable legal requirements. The court explained that:

14 Regulation S-P was adopted by the Securities and Exchange
15 Commission to implement privacy provisions contained in the
16 Gramm-Leach-Bliley Act of 1999. That regulation prohibits
17 disclosure of confidential customer information unless
18 customers first receive an initial privacy notice explaining what
19 nonpublic personal information will be disclosed, to whom, and
20 under what circumstances, and then are given the chance to opt
21 out of that disclosure. While this is true as a general
22 proposition, it does not preclude disclosure in this case because
23 of the exception found in 17 C.F.R. § 248.15(a)(7)(i). That
24 subsection provides that the otherwise-applicable requirements
25 of notice and the right to opt out do not apply when nonpublic
26 personal information is disclosed "[t]o comply with federal,
27 State, or local laws, rules and other applicable legal
28 requirements." Disclosure of nonpublic personal information in
this case-specifically of a list of names and addresses-would fall
within 17 C.F.R. § 248.15(a)(7)(i) because it would be required
under state law and other applicable legal requirements. The
defendants' argument based on federal law thus fails as well.

26 Id. at *4.

1 In this case, the FTDF Operating Agreement expressly guarantees "any Member or
2 such Member's representatives" access to the list of "all Members, together with the number
3 of Units held by each Member." Unlike the LLC agreement in Arbor Place, there is no
4 provision in the FTDF Operating Agreement that would even cast the color of confidentiality
5 upon the Member List, or that would otherwise provide Debtors with any cause to withhold
6 such information.
7

8 Certainly the FTDF Committee, whether in the individual capacities of each of its
9 members, or in the committee's collective capacity as representative of all FTDF Members,
10 possesses sufficient authority pursuant to the FTDF Operating Agreement to be entitled to the
11 Member List. "There is little question that shareholders of a corporate debtor-in-possession
12 retain their state law rights to control a corporation, and that such rights cannot be lightly cast
13 aside by this Court." Matter of Lifeguard Industries, Inc., 37 B.R. 3, 17 (Bankr. S.D. Ohio
14 1983). If this maxim is true with regard to something as significant as corporate control, it is
15 certainly true with respect to a review of the corporation's books and records.
16

17 Accordingly, the FTDF Committee respectfully requests that the Court compel the
18 Debtors' to provide the FTDF Committee with access to the FTDF Member List.
19

20 **B. Adequate Safeguards Are Already in Place to Ensure the Confidentiality of**
21 **the Requested Information.**

22 As discussed above, it is not the FTDF Committee's intent to place the Member List
23 on public record; indeed, it has actively worked with the Debtors' to prevent any unnecessary
24 disclosure of such information.

25 However, with respect to the FTDF Committee's need for the information, there are
26 safeguards already in place that would adequately address the desire of all parties to
27

1 keep the information contained within the Member List confidential. The FTDF Committee
 2 has already entered into a Confidentiality Agreement with the Debtors' with respect to
 3 confidential information generally shared throughout the USA bankruptcy cases. This
 4 agreement has been circulated internally such that all of the FTDF Committee's members and
 5 professionals are familiar with the terms of the Confidentiality Agreement.
 6

7 Under these circumstances, the FTDF Committee sees no reason justifying the
 8 Debtors' continuing reluctance to provide it with access to the Member List.

9 III.

10 CONCLUSION

11 For the reasons stated above, the FTDF Committee respectfully requests that the Court
 12 compel the Debtors' to provide confidential access to the list of the FTDF Members and their
 13 respective Interests.
 14

15 DATED this 14TH day of September, 2006.

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